

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT TACOMA

DARNELL OTIS MCGARY,

Petitioner,

v.

HENRY RICHARDS,

Respondent.

CASE NO. C09-5156 BHS

ORDER DECLINING TO ISSUE  
A CERTIFICATE OF  
APPEALABILITY

This matter comes before the Court on the referral from the Ninth Circuit Court of Appeals to determine whether a certificate of appealability should issue. Dkt. 42.

**I. PROCEDURAL HISTORY**

In 2009, McGary filed a petition for habeas corpus relief under 28 U.S.C. § 2254 in this Court. Dkt. 1. On August 19, 2009, U.S. Magistrate Judge Strombom issued a report and recommendation, recommending that the Court dismiss McGary's petition with prejudice. Dkt. 21. McGary filed objections to the report and recommendation. Dkt. 23. On September 29, 2009, this Court approved and adopted Judge Strombom's report and recommendation and dismissed McGary's petition with prejudice. Dkt. 25;

1 *see also* Dkt. 31 (Judgment, entered on November 13, 2009). The Court denied  
2 McGary's request for issuance of a certificate of appealability. Dkt. 32. On February 28,  
3 2011, the Ninth Circuit also denied a certificate of appealability. Dkt. 35 (Mandate).

4 On January 28, 2013, McGary filed a motion under Fed. R. Civ. P. 60(b)(6),  
5 seeking to reopen his 2009 habeas corpus proceeding. Dkt. 37. On January 31, 2013,  
6 Respondent Dr. Henry Richards filed a response in opposition to McGary's motion. Dkt.  
7 38. On February 11, 2013, McGary filed a reply. Dkt. 39.

8 On March 14, 2013, the Court issued an order denying McGary's 60(b)(6) motion.  
9 Dkt. 40. On March 21, 2013, McGary filed a notice of appeal. Dkt. 41. On March 28,  
10 2013, the Ninth Circuit Court of Appeals remanded this case for the limited purpose of  
11 determining whether a certificate of appealability should issue. Dkt. 42.

## 12 II. DISCUSSION

13 A petitioner seeking post-conviction relief under 28 U.S.C. § 2254 may appeal a  
14 district court's dismissal of his federal habeas petition only after obtaining a certificate of  
15 appealability from a district or circuit judge. A certificate of appealability may issue only  
16 where a petitioner has made "a substantial showing of the denial of a constitutional  
17 right." *See* 28 U.S.C. § 2253(c)(3). A petitioner satisfies this standard "by demonstrating  
18 that jurists of reason could disagree with the district court's resolution of his  
19 constitutional claims or that jurists could conclude the issues presented are adequate to  
20 deserve encouragement to proceed further." *Miller-El v. Cockrell*, 537 U.S. 322, 327  
21 (2003).

1 In this case, the Court finds that McGary's petition and other pleadings do not  
2 make a substantial showing of the denial of a constitutional right. McGary's submissions  
3 do not contain factual or legal argument from which this Court can conclude that he  
4 presents legal issues which deserve encouragement to proceed further. Therefore, the  
5 Court declines to grant a certificate of appealability.

6 **III. ORDER**

7 It is hereby **ORDERED** that a certificate of appealability is **DENIED**.

8 Dated this 29<sup>th</sup> day of March, 2013.

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BENJAMIN H. SETTLE  
12 United States District Judge  
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